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No. 87-704

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,

*Petitioner*,

—v.—

BERNARD LITMAN,

*Respondent*.

## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, Massachusetts Mutual Life Insurance Company, files this reply to Respondent's Brief in Opposition to the Petition for a Writ of Certiorari to the Court of Appeals for the Eleventh Circuit.[1]

## REPLY TO THE RESPONDENT'S ARGUMENT IN OPPOSITION TO REASONS FOR GRANTING THE WRIT

Petitioner, Massachusetts Mutual Life Insurance Company ("Mass. Mutual"), has demonstrated that the court below seriously departed from *Erie* principles by mandating that Mass. Mutual must undergo a second trial on punitive damages. Respondent, Bernard Litman ("Litman"), raises three arguments in response: (1) he suggests that the issue of the *en banc* court's violation of *Erie* is not properly before this Court, because the issue was not raised by Mass. Mutual in the first appeal; (2) the action of the *en banc* court is consistent with

1 In compliance with Rule 28.1 of the Supreme Court Rules, Petitioner, Massachusetts Mutual Life Insurance Company, incorporates by reference the list of subsidiaries contained in the Petition for Writ of Certiorari.

Florida law; and (3) that Mass. Mutual has stated no basis for certiorari review. Litman's arguments are without foundation in either fact or law and to the extent that he relies on Florida law at all, he relies on a Florida case that does not reach the issues upon which this petition is predicated.

**1. The *Erie* Violation is Properly Before this Court**

The failure to adhere to *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), and to apply settled state law occurred with the *en banc* court of appeals and did not, as Litman maintains, arise in the first appeal. Litman has recharacterized both Mass. Mutual's position and the record below in an attempt to manufacture an argument more to his liking. The fact remains, however, that it was not the panel in the first appeal nor the panel in the second appeal, but the *en banc* court that failed to consider or apply settled Florida law.

Furthermore, it is absurd to suggest that a party must anticipate that a court will fail to follow *Erie* and thus extensively brief the point. The *Erie* doctrine has been the law for nearly half a century. *See Erie*, 304 U.S. at 64.

Litman's claim of waiver is invalid for the additional reason that Mass. Mutual did, in fact, raise the *Erie* claim before the *en banc* Eleventh Circuit. The issue was raised by Mass. Mutual in its *en banc* brief, not in a "supplemental" brief as characterized by Litman.[2]

That the *Erie* issue did not arise until the *en banc* court ruled necessarily distinguishes the *en banc* decision from the cases upon which Litman relies.

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2 Mass. Mutual raised *Erie* by stating: "The panel majority simply concluded as they were *Erie* bound to do . . . ." (pg. 19 *en banc* brief of Mass. Mutual). Litman, therefore, misstates the record when he says at page 5 of his Response to the Petition for Certiorari that "*Erie* itself was never cited in the defendant's briefs." Waiver, even if relevant, does not turn on the number of lines in a brief which are devoted to a point of law.

In both *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970) and *Delta Airlines, Inc. v. August*, 450 U.S. 345 (1981), the alleged error occurred in the district court, was never raised before the court of appeals and was raised for the first time before the Supreme Court. *See Adickes*, 398 U.S. at 148 n.2 ("The District Court denied petitioner's request to amend her complaint to include a third count. . . . Although in her certiorari petition, petitioner challenged this ruling, . . . the record shows that petitioner never raised any issue concerning [this] before the Court of Appeals."); *Delta Airlines*, 450 U.S. at 362 ("Although defendant's petition for certiorari presented the question of the District Judge's abuse of discretion . . . that question was not raised in the Court of Appeals and is not properly before us.").

There is no higher intermediate court of appeals before whom Mass. Mutual may seek review. The failure of the *en banc* court of appeals to apply binding substantive state law in a diversity case first arose in the *en banc* opinion below and is properly before this Court now for review.

**2. Under a Correct *Erie* Analysis, State Law Controls the Availability of a Right to Retrial on the Issue of Punitive Damages**

The right in question here is the right to a new trial on the issue of punitive damages. In Florida, the plaintiff has no right to punitive damages. In consequence, the Florida courts quite logically have found that the plaintiff also has no right to a new trial based on claimed insufficiency of an award alone. *St. Regis Paper Co. v. Watson*, 428 So. 2d 243, 247 (Fla. 1983).

Proper *Erie* analysis requires more than the superficial statement that because a rule of appellate "procedure" is implicated, state law becomes moot and is not binding on a federal diversity court. What Litman prefers to characterize as "procedure" is viewed by the Florida Supreme Court as a substantive right. *St. Regis*, 428 So. 2d at 247; *See also Adler*

*v. Seligman of Florida*, 438 So. 2d 1063, 1068 (Fla. 4th DCA 1983).

Florida's policy decision regarding punitive damages is clearly an issue which "affects those primary decisions respecting human conduct which our constitutional system leaves to *state* regulation." *Hanna v. Plumer*, 380 U.S. 460, 475 (1965) (Harlan, J., concurring) (emphasis added). On the issue of punitive damages, state law, therefore, is binding on a federal appellate court sitting in diversity. *Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U.S. 525 (1958); *Hanna*, 380 U.S. at 460.

### 3. Under Florida Law Litman May Not Force Mass. Mutual to Endure a Retrial on Punitive Damages

The Florida Supreme Court has determined that absent a fraud on the judicial system only the defendant is entitled to a new trial on the amount of punitive damages to be awarded. *St. Regis*, 428 So. 2d at 247; *Adler*, 438 So. 2d at 1064. Under Florida law the plaintiff simply "has *no* right to punitive damages." *St. Regis*, 428 So. 2d at 247 (emphasis in original). Since that right belongs only to the defendant,[3] a plaintiff cannot force a defendant to endure a retrial on punitive damages solely to gain a shot at enlarging the punitive damages award the second time around. The result of the *en banc* court's decision is to allow Litman to do exactly what he may not under Florida substantive law based upon an untenable "mandate rule" justification.[4]

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3 In Florida, a defendant has "a *right* to be free from unreasonable punishment inflicted by an excessive punitive damages award." *St. Regis*, 428 So. 2d at 247 (emphasis added).

4 In Florida, a new trial on punitive damages can only be ordered under certain limited circumstances. Under Florida law a new trial on punitive damages is permitted only "when the manifest weight of the evidence shows that the amount of punitive damages assessed is out of all reasonable proportion to the malice, outrage or wantonness of tortious conduct." *Arab Termite and Pest Control of Florida, Inc. v. Jenkins*, 409 So. 2d 1039, 1043 (Fla. 1982).

To mask the *en banc* court's error, Litman relies principally on an intermediate Florida appellate court opinion which Litman suggests supports the *en banc* court's decision. The case, *Flagship National Bank v. Gray Distribution Systems, Inc.*, 485 So. 2d 1336 (Fla. 3d DCA), *review denied*, 497 So. 2d 1217 (Fla. 1986), does not decide or even discuss the issue presented in the instant litigation.

*Flagship* does stand for the proposition that a *defendant*—as opposed to a plaintiff—who prevails on appeal may be *entitled* to a retrial on the issue of compensatory and punitive damages. Nowhere, though, does the court in that case treat the question whether a defendant on remand may choose to forego *his* right to a retrial on punitive damages and accept the jury award from the first trial. *Id.* at 1341. Consequently, in citing *Flagship*, Litman relies on a case which was in exactly the same posture as was the instant case up through the first panel appeal. Unlike the instant case, however, *Flagship* has no subsequent reported history. In an obvious effort to evade the real issue with which Litman apparently does not wish to deal, he cites a case where the issue of disposition on remand was never addressed.

In his discussion of *Flagship*, Litman fails to disclose that the *Flagship* court cited with approval another Florida case, *Adler v. Seligman of Florida, Inc.*, 438 So. 2d at 1063. In *Adler*, the court relied on *St. Regis* and repeated that in Florida a plaintiff does not have a "right to a punitive award even if the evidence would support such an award." *Id.* at 1068 (emphasis added in part). On the basis of *St. Regis*, the *Adler* court refused to remand with instructions that would require the fact finder to assess punitive damages against the defendant. *Id.*

The point is, thus, settled and unambiguous in Florida. The plaintiff has no right to appeal on the issue of the sufficiency of a punitive damage award. Therefore, the defendant may not be forced on remand to suffer a second trial on this issue. *St. Regis*, 438 So. 2d at 247; *Adler*, 438 So. 2d at 1068. The

Florida Supreme Court's opinion in *St. Regis* remains as the clear and binding statement of Florida law.[5]

### 4. The Failure of the *en banc* Court of Appeals to Adhere to *Erie* Principles is Not an Error Which is Unique to this Case

Litman's attempt to alter the facts in this case is apparent as he strives to recast the case as one involving a peculiar fact situation coupled with a misapplication of Florida law. That is not the issue presented in this case, and despite Litman's efforts to have this Court believe otherwise, the facts—as opposed to Litman's argument—support Mass. Mutual's position. The record below clearly reveals that the error the *en banc* court committed was not a misapplication of Florida law, but rather where *Erie* is concerned, a more significant error, a failure to consider state substantive law.

This Court has previously found the *Erie* doctrine to be sufficiently important to warrant the exercise of the Court's discretionary jurisdiction. *See, e.g., Stewart Organization, Inc. v. Ricoh Corp.*, 810 F.2d 1066 (11th Cir.) (per curiam) (*en banc*), *cert. granted*, ____ U.S. ____, 108 S. Ct. 225 (1987); *Burlington Northern R. Company v. Woods*, ____ U.S. ____, 107 S. Ct. 967 (1987); *Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3 (1975) (per curiam); *Hanna v. Plumer*, 380 U.S. at 460. Moreover, *Ricoh*, *Burlington Northern R. Co.*, and *Challoner*, are all recent *Erie* cases arising out of either the Eleventh Circuit or its predecessor, the old Fifth Circuit, thus suggesting that recognition and application of *Erie* is far from "settled"

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5 If the Eleventh Circuit had any doubt as to the Florida law with respect to punitive damages, it should have utilized the certification procedure available in Florida and certified the question to the Florida Supreme Court. *See* Fla. R. App. P. 9.150; *See also Lehman Brothers v. Schein*, 416 U.S. 386, 391 (1974) (In *Schein*, this Court endorsed the certification procedure available in Florida when there is any doubt regarding a controlling issue of Florida law.).

and continues, at least in the Eleventh Circuit, to be problematic.

In particular, the Eleventh Circuit case, *Stewart Organization, Inc. v. Ricoh Corp.*, 810 F.2d at 1066, which this Court will shortly consider,[6] underscores the continuing difficulty the Eleventh Circuit has with *Erie* questions. In *Ricoh*, the *en banc* Eleventh Circuit, after performing its *Erie* analysis, concluded that federal rather than state law governs the enforceability of a forum-selection clause in a contract between private parties even though if the case had been brought in the courts of the forum state the contract would *not* have been enforced. *Id.*

In *Ricoh*, the dissent charges that the *en banc* court's *Erie* analysis is flawed because of a confusion about the real issue in the case. *Id.* at 1077 (Godbold, J., dissenting) ("*This case is not about what court is suitable. It is about an agreement to choose between suitable courts.*") (emphasis in original).

The Eleventh Circuit's confusion over *Erie* has continued unabated and with the instant case has turned down a more troubling path. By failing to even consider *Erie* (as opposed to misapplying *Erie*), the Eleventh Circuit threatens a return to the time, preceding *Erie R. Co. v. Tompkins*, when the federal courts refused to acknowledge state decisions by favoring a uniformity of federal general common law, and when the outcome in a case was determined by the fortuitous selection of which courthouse one chose within the same state. *See, e.g., Swift v. Tyson*, 10 U.S. (16 Pet.) 1 (1842); *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518 (1928).

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6 The court also currently has before it *Bankers Life and Casualty Company v. Crenshaw*, 483 So. 2d 254 (Miss. 1985), *prob. juris. noted*, _____ U.S. _____, 107 S. Ct. 1367 (1987), a case which raises the issue of the unconstitutionality of unfettered jury discretion in punitive damages cases. That issue is highlighted here by the fact that Mass. Mutual already having run the gauntlet once, now faces a forced retrial on the issue of punitive damages.

The only justification offered by the Eleventh Circuit for its intrusion into a matter rightly left to state determination is the need to preserve the sanctity of the mandate rule.[7] When measured against the conscious policy choice of a state in an area solely of state concern the comparative federal interest, to the extent that it even exists, is simply too weak a ground upon which to allow the decision to stand. *See* C. Wright, The Law of Federal Courts 386 (4th ed. 1983); *See also* Redish & Phillips, *Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 Harv. L. Rev. 356 (1977).

Litman, therefore, is wrong when he states that the *Erie* doctrine in general and the *Erie* question presented in this case are unworthy of this Court's consideration. The *Erie* doctrine expresses the cardinal principles of comity and federalism. *See Hanna*, 380 U.S. at 474 (Harlan, J., concurring). As in *Ricoh*, the writ should issue in this case to resolve whether state law should have been applied.

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7 There is serious question about this point as well. Curiously, the Eleventh Circuit chose to construe the lower court's ruling as high offense, when the trial judge, the first panel, and four judges of the Eleventh Circuit saw a clear way of interpreting the action below in a consistent fashion with the mandate.

## Conclusion

Petitioner, Massachusetts Mutual Life Insurance Company, respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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